Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-316

HERBERT PEPE BISTANY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA; SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES; MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

JOHN GUERIN
1118-A Pacific Coast Highway
Huntington Beach, California 92648
Telephone - (714) 536-9366

Attorney for Petitioner
Herbert Pepe Bistany.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. .....

HERBERT PEPE BISTANY,

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THE PEOPLE OF THE STATE OF CALIFORNIA; SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES; MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

This is a petition for Writ of Certiorari to review a judgment of the Superior Court of the State of California for the County of Los Angeles through its Appellate Department (hereinafter referred to as "Appellate Department") and the judgment of the Municipal Court of the County of

Los Angeles, State of California, Beverly Hills Judicial District (hereinafter referred to as "Municipal Court").

The decision of the Appellate Department, affirming the conviction of petitioner of a violation of Section 653f of the Penal Code of the State of California, was filed June 13, 1975. A copy of the decision is attached as Appendix A.

A petition for rehearing was denied by the Appellate Department on June 20, 1975, and a request to certify the case to the Court of Appeal of the State of California was also denied in the same order (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3), the Appellate Department being a court of last resort when it refused to certify a case to the Court of Appeal.

STATEMENT OF THE CASE

The petitioner was charged with a misdemeanor violation of Penal Code § 653f, in that on April 18, 1974, he unlawfully solicited William Beckett to commit and join in the commission of the crime of assault by means of force likely to produce great bodily injury.

The pertinent portions of Penal Code § 653f read as follows:

> "Every person who solicits another to offer or accept or join in the offer or acceptance of . . . or to commit or join in the commission of . . . assault . . . by means of force likely to produce great bodily injury, is punishable by imprisonment in the County Jail not more than one year or in the State Prison not more than five years, or by fine of not more than five thousand dollars ($5,000), or by both such fine and imprisonment . . . . "

The police videotaped a meeting between petitioner and Beckett on April 18, 1974. The only significant portion of the tape is as follows:

> "BECKETT: They just want him, they just want him beat up, right?"
>
> "BISTANY: Yeah, beat him up, you know, I mean, beat him over the, noticeable though, you know, I mean, a . . . or you know, so he can't come to work tomorrow. Something like that, you know."

The day prior to the videotaping, the police taped a telephone conversation between petitioner and Beckett which contained no solicitation by petitioner. Beckett testified that he was paid $100.00 on account. Petitioner testified that the $100.00 was partly repaying a loan and partly payment for a knife. There was evidence that the intended victim was an attorney who was representing the wife in a divorce action and the person paying the money was the husband.

The complaint in this case was filed April 24, 1974. On May 14, 1974, petitioner pleaded not guilty and pretrial was set for June 26, 1974, at which time the case was set for trial on August 12, 1974. On August 12, 1974, petitioner's counsel moved to be relieved as attorney for petitioner, but no ruling was made on the motion; instead,

the case was continued for one week to August 19, 1974. On August 19, 1974, petitioner appeared with new counsel, Robert Fratianne. Fratianne moved for continuance because he had just finished a five-week murder trial and was not prepared for trial, and on the further ground that certain pre-trial discovery and suppression motions were needed and said counsel had not heard the telephone tape or the videotape. There was no written or spoken opposition to the motion for continuance. The motion was denied; however, before trial commenced, Fratianne was furnished with transcripts of the tapes and viewed the videotape.

The only instruction the court gave to the jury on the subject matter of the offense involved was as follows:

> "Every person who solicits another to commit or join in the commission of an assault by force likely to produce great bodily injury is guilty of a misdemeanor."

The court also gave an instruction on corroboration evidence, but the court did not define "great bodily injury" and the court gave a "general intent" rather than "specific intent" instruction.

Petitioner was found guilty by the jury, and on September 25, 1974, imposition of sentence was suspended and petitioner was placed on probation for three years on the condition that he pay a $250.00 fine and serve six months in the County Jail. Petitioner appealed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Penal Code § 653f:

> "Every person who solicits another to offer or accept or join in the offer or acceptance of a bribe, or to commit or join in the commision of murder, robbery, burglary, grand theft, receiving stolen property, extortion, rape by force and violence, perjury, subornation of perjury, forgery, kidnapping, or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury, is punishable by imprisonment in the County Jail not more than one year or in the State Prison not more than five years, or by fine of not more than five thousand dollars ($5,000), or by both such fine and imprisonment. Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

Amendment No. 1 - United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Amendment No. 5 - United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment No. 6 - United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment No. 14 - United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the

Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of such House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

REASONS FOR GRANTING THE WRIT

Judges, appellate justices and lawyers are reputedly men of *uncommon* (above average) intelligence.

Despite the reputation aforementioned, judges, justices and lawyers have a difficult time telling what is prohibited by "assault by means of force likely to produce great bodily injury."

California has conflicting decisions on the meaning of the aforesaid. If men of above the average intelligence differ on the meaning, then how can men of *common* intelligence be expected to understand the meaning?

The above would be the sole problem if this case involved California Penal Code § 245. But this case does not involve that section; instead, it involves Penal Code § 653f, which makes it a crime to express oneself in speech so as to *solicit* an assault by means of force likely to produce great bodily injury. Since this statute involves a limitation on the freedom of speech, the danger of inexplicit legislation in that regard carries with it the same danger as any other statute impairing the right to free speech.

ARGUMENT

1. Penal Code § 653f is, on its face, an indefinite and uncertain criminal statute insofar as it prohibits a solicitation of an assault by means of force likely to produce great bodily injury.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' "

Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618 (1939).

That portion of Penal Code § 653f applicable in this matter was not included in said section until the 1970 amendment thereto.

"Great" has a flexible meaning. Among the definitions of "great" are:

1. Of much more than ordinary size;
2. Higher in some quality or degree;
3. Much above the ordinary or average; and
4. Highest in its class.

The third definition appears the closest to use in Penal Code § 653f. In order to ascertain the meaning of "great bodily injury" one would have to know what the definition of "average" bodily injury is.

If the respondents do not concede that the meaning of "great bodily injury" is vague, indefinite and uncertain, then no doubt the respondents will clarify this meaning in any response to this petition, and also inform the Court of the meaning of "average" bodily injury, so that the definition supplied can be checked.

In *Ricks v. United States,* 414 F.2d 1111, at page 1117, the court said:

"We are not at liberty to ignore the shortcomings of the statutory language or rationalize its validity simply on the basis of the methods associated with its administration. A statute attacked as vague must initially be examined 'on its face', and many times the inquiry need extend but little further. The *sine qua non* of the constitutional certainty in the definition of a crime is fair warning of the statutory prohibition to those of ordinary intelligence–notice of the proscribed activities which is reasonable when gauged by common understanding and experience."

The justices of California courts are unable to agree on what "force likely to produce great bodily injury" means. See, *People v. Fuentes,* 74 Cal. App. 2d 737, 741, 169 P.2d 391 (1946), and *People v. Wells,* 14 Cal. App. 3d 348, 357, 358, 92 Cal. Rptr. 19.

In *United States v. Cardiff,* 344 U.S. 174, 176, 97 L. Ed. 200, 73 S. Ct. 189, 190 (1952), the Court said:

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

In *People v. Wells, supra,* the California court reasons that it is the force *likely to produce* such injury which is prohibited by Penal Code § 245, and that the crime occurs

even if no physical injury results, and (impliedly) that a blow from the fist is such a force.

If the logic of *People v. Wells, supra,* is applied to everyday occurrences, our expenses for juvenile courts will be substantially increased. Under the logic of *Wells,* every schoolboy who asks his big brother to beat up another child will have been guilty of violating Penal Code § 653f. The same would be true of any minor who requests that his father beat up a neighbor who has ordered the minor off his lawn.

2. Assnuming for purposes of argument that Penal Code § 653f is not void "on its face," the statute is void because of failure to fix standards as to what is and what is not prohibited.

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."
>
> *Giasso v. Pennsylvania,* 382 U.S. 399, 402, 403, 15 L. Ed. 2d 447, 450, 86 S. Ct. 578 (1966).

To illustrate that this statute and Penal Code § 245 leave to the judge or jury the determination—without any fixed standards—what is prohibited and what is not prohibited in any given case, one should see the facts reported in *People v. Spreckels,* 125 Cal. App. 2d 507 (1954). In

the *Spreckels* case the defendant called his ex-wife vile names, knocked her down, pulled her by the hair of her head over to a door, kicked her, and beat her about the head and arms with one of her shoes; she was bleeding, lost consciousness, and was taken to a hospital where she remained for 10 days. Although Spreckels was charged with assault by means of force likely to produce great bodily injury (Penal Code § 245), a felony, the jury found him guilty of simple assault—a lesser included offense.

While *People v. Fuentes, supra,* has been criticized for some of the statements it contains by justices of the Court of Appeal on the same level as the court in *Fuentes,* the other courts have not criticized the following quote from *Fuentes:*

> "Battery 'is any willful and unlawful use of force or violence upon the person of another,' (Pen. Code § 242), and is punishable as a misdemeanor. When the force used in committing the battery is 'likely to produce great bodily injury' it becomes a felony if a penitentiary sentence is imposed as was done here (Pen. Code § 245). That the Legislature intended to define two separate and distinct crimes is clear from the use of two separate code sections and the different penalties for each. *Of course, the dividing line between the two is not always distinct but we do not believe that condition exists here.*" (Emphasis added.)
>
> *People v. Fuentes, supra,* 74 Cal. App. 2d at 741.

California leaves the determination of force likely

to produce great bodily injury to the jury without guidelines. In *People v. Kenman,* 134 Cal. App. 2d 417, 422 (1955), the court holds that what force is likely to produce great bodily injury is a question of fact for the jury, and whether a fist is likely to produce such injury is to be determined by the force of the impact, the manner in which it was used, and the circumstances under which it was applied. Summarized, *Kenman* and other cases involving Penal Code § 245 make the determination of the "force likely to produce great bodily injury" *after the fact,* not before.

Since there is no injury upon which to make the foregoing determination in a charge involving Penal Code § 653f, the said section is a net large enough to catch almost everyone, leaving the determination as to what is prohibited to the magistrate or to the jury.

3. Assuming that Penal Code § 653f is not void as a vague and uncertain criminal statute, the court in this case gave the said section an unconstitutional application.

The Municipal Court instructed the jury:

> "Every person who solicits another to commit or join in the commission of an assault by force likely to produce great bodily injury is guilty of a misdemeanor,"

and,

> "(To constitute the offense charged against the defendant, there must be a joint operation of act or conduct and criminal intent.
>
> "When a person intentionally does that

> which the law declares to be an offense, he is acting with criminal intent, even though he may not know that his conduct is unlawful, or even though he may not intend to violate the law.)"

No further instructions defining force, assault, means or great bodily injury were given.

No specific intent instruction was given.

The term "due process of law" asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice. See, *Brown v. New Jersey,* 175 U.S. 172, 176, 44 L. Ed. 119, 121, 20 S. Ct. 77.

The definition in each case depends upon the circumstances, varying with the subject matter and the necessities of the situation. *Moyer v. Peabody,* 212 U.S. 78, 84, 53 L. Ed. 410, 416, 29 S. Ct. 235.

The effect of the court's instruction was that if petitioner told Beckett to beat up the attorney, he was guilty.

4. The petitioner was deprived of his right to counsel by the denial of his motion for continuance.

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
>
> U. S. Constitution, 6th Amendment.

The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335, 342, 9 L. Ed. 2d 799, 803, 83 S. Ct. 792.

Petitioner did not have counsel if counsel cannot know in advance what the prohibited conduct is from the language of the statute. Since the courts do not know what is prohibited until after the jury decides the case, it would be presumptive to assume that defense counsel knew same.

Petitioner's counsel was not prepared for trial. Petitioner's prior attorney moved to be relieved as his counsel, and the case was continued one week without ruling on the motion. New counsel's motion for continuance because he had just finished a five-week murder trial and was not prepared was denied. Since petitioner had no counsel prepared for trial, in effect he had no counsel.

5. The statute involved violates petitioner's right to freedom of speech.

Of California statutes it is not a crime to solicit a simple assault (Penal Code §§ 653f and 242).

Since, as a practical matter, it is impossible to determine the difference between solicitation of a simple assault and solicitation of assault by means of force likely to produce great bodily injury, the statute does not put petitioner on notice of what kind of otherwise permissible speech is prohibited.

The case of *Cohen v. California*, 403 U.S. 15, 19, 29 L. Ed. 2d 284, 290, 91 S. Ct. 1780 (1971), is analogous. In that case the Supreme Court said, among other things:

> "In the first place, Cohen was tried under a statute applicable throughout the entire state. Any attempt to support this conviction

> on the ground the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places . . . .
>
> "No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created." (403 U.S. at 19.)

Said case also holds:

> "The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' " (403 U.S. at 23.)

The constitutional challenges were raised at first opportunity in respondent Superior Court of the State of California.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this petition for Writ of Certiorari be granted and that the issues herein raised be given consideration by this Court.

Respectfully submitted,

JOHN GUERIN

Attorney for Petitioner

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DECISION OF THE APPELLATE DEPARTMENT

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CR A 13087.

Trial Court No. M 39994.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HERBERT PEPE BISTANY, Defendant and Appellant.

[FILED June 13, 1975]

On APPEAL from the MUNICIPAL COURT of the Beverly Hills Judicial District, County of Los Angeles, State of California. Leonard S. Wolf, Judge. (653[f] PC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

HOLMES, Presiding Judge

MARSHALL, Judge

ALARCON, Judge

Mailed at Los Angeles, Ca. June 13, 1975

APPENDIX B

ORDER DENYING REHEARING AND DENYING CERTIFICATION

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CR A 13087.

Municipal Court of the Beverly Hills Judicial District No. M 39994.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HERBERT PEPE BISTANY, Defendant and Appellant.

[FILED June 30, 1975]

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

HOLMES, Presiding Judge

MARSHALL, Judge

ALARCON, Judge

Mailed at Los Angeles, Ca. June 30, 1975

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 20, 1975, I served the within PETITION FOR WRIT OF CERTIORARI (BISTANY v. PEOPLE OF THE STATE OF CALIFORNIA, et al.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Evelle J. Younger, Attorney General
State of California
3580 Wilshire Blvd., Room 800
Los Angeles, California 90010
[1 copy]

District Attorney
County of Los Angeles
Appellate Division
849 South Broadway - 11th Floor
Los Angeles, California 90014
[2 copies]

Superior Court of the
State of California
County of Los Angeles
Appellate Department
Los Angeles, California 90012
[1 copy]

The Hon. Leonard Wolf
Beverly Hills Judicial District
Municipal Court
6355 Burton Way
Beverly Hills, California
[1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 20 1975, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca.92648
(714) 536-7161

BEST COPY AVAILABLE